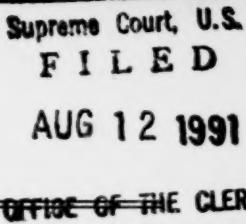


91-257

No. \_\_\_\_\_



In The  
**Supreme Court of the United States**  
October Term 1991

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**NUTMEG INSURANCE COMPANY,**

*Petitioner,*

v.

**THE CITY OF ROSE CITY, CURTIS SMITH, and  
SMITH MATERIAL CORPORATION OF BEAUMONT,**

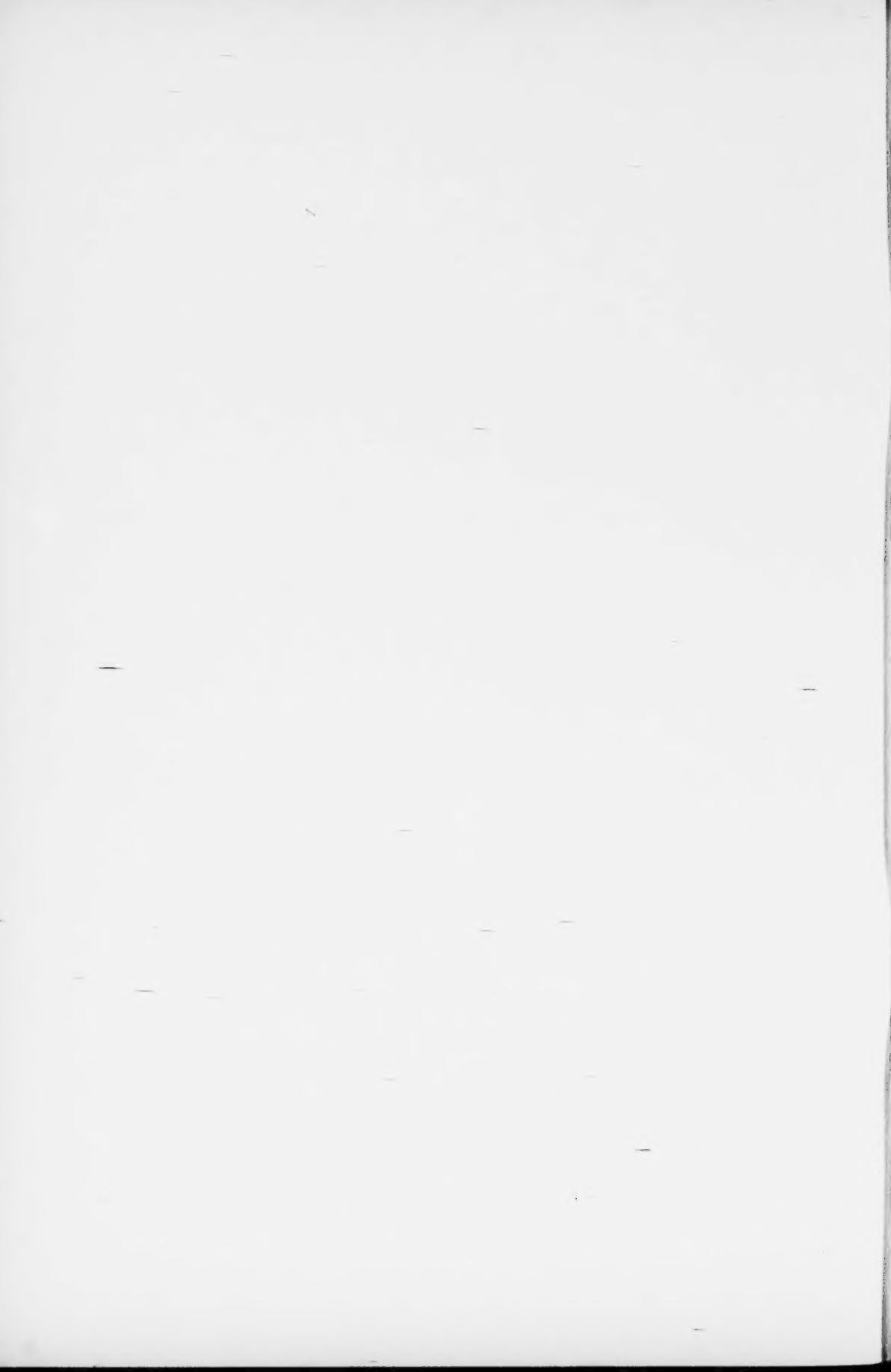
*Respondents.*

-----♦-----  
**Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

-----♦-----  
**PETITION FOR WRIT OF CERTIORARI**

-----♦-----  
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*Attorneys for Petitioner*



## **QUESTION PRESENTED**

**Does an insurer waive its right to remove a lawsuit from state to federal court by agreeing to a policy provision that it will "submit to the jurisdiction of any Court of Competent jurisdiction within the United States"?**

**LIST OF ALL PARTIES**

Nutmeg Insurance Company (owned by Hartford Accident & Indemnity Company, which is owned by Hartford Fire Insurance Company);

The City of Rose City, Texas;

Curtis Smith; and

Smith Material Corporation of Beaumont.

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No. \_\_\_\_\_

In The  
**Supreme Court of the United States**  
**October Term 1991**

NUTMEG INSURANCE COMPANY,

*Petitioner,*

v.

THE CITY OF ROSE CITY, CURTIS SMITH, and  
SMITH MATERIAL CORPORATION OF BEAUMONT,

*Respondents.*

**Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

**PETITION FOR WRIT OF CERTIORARI**

TO THE SUPREME COURT OF THE UNITED STATES:

Nutmeg Insurance Company petitions for a writ of certiorari, asking this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit vacating the district court's denial of Smith's motion for remand to state court.

**OPINIONS BELOW**

This case arises from the final judgment of the United States District Court for the Eastern District of Texas,

Beaumont Division, in Civil Action No. 1:90-CV-0373. The opinion for the United States Court of Appeals for the Fifth Circuit is reported at 931 F.2d 13 (5th Cir. 1991). Copies of the district court's judgment and the Fifth Circuit's opinion are reprinted in the Appendix to this petition.

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### **STATEMENT OF JURISDICTION**

The United States Court of Appeals for the Fifth Circuit rendered its judgment on May 13, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

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### **STATUTE AT ISSUE**

28 U.S.C. § 1441(a) (1988):

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

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### **STATEMENT OF THE CASE**

The material facts are undisputed. In his original petition filed in state court, Smith sought recovery

against Nutmeg Insurance Company on his own behalf and as assignee of the City of Rose City for breach of contract, various violations of the Texas Insurance Code, and for breach of the implied duty of good faith and fair dealing (R. 6-17). Nutmeg removed the case to federal court based on diversity of citizenship (R. 1-3). See 28 U.S.C. §§ 1332(a)(1), 1441(a) (1988). The federal district court denied Smith's motion for remand (R. 140), but the Fifth Circuit vacated that order and instructed the district court to remand the case to state court. *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13 (5th Cir. 1991). Nutmeg petitions for a writ of certiorari to correct this error by the Fifth Circuit.

Prior litigation between Smith and the City had concluded with a consent judgment against the City in the amount of \$3,500,000 (R. 65-66, 71-79). After that consent judgment was entered, the City demanded indemnification from Nutmeg and assigned its rights under all its insurance policies to Smith (R. 8). Nutmeg then filed a declaratory judgment action in federal court to establish that the occurrence in question was not covered by the claims made public entity policy at issue (R. 80-81). The federal district court rendered a declaratory judgment in favor of Nutmeg (R. 95-96), and Smith appealed to the Fifth Circuit, which affirmed. *Nutmeg Ins. Co. v. The City of Rose City*, No. 90-4069 (5th Cir. July 3, 1990).

Smith filed neither a motion for rehearing nor a petition for writ of certiorari. Instead, Smith filed the present suit against Nutmeg in Texas state court under the City's general liability policy (R. 6-18). Nutmeg sought removal (R. 1-3). Smith filed a motion for remand

(R. 121-22). Smith's motion relied on a "Service of Suit" clause in the insurance policy, which provided:

In the event of our failure to pay any amount claimed to be due under your policy, we, at your request, agree to submit to the jurisdiction of any Court of Competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court . . . .

(R. 53.)

Nutmeg also filed a motion for summary judgment (R. 93-111). The federal district court denied Smith's motion to remand (R. 140) and granted Nutmeg's motion for summary judgment (R. 141). Although on appeal Smith did not challenge the propriety of the summary judgment against him, the Fifth Circuit vacated the judgment and instructed the district court to remand the case to state court. *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13 (5th Cir. 1991).

The Fifth Circuit's opinion, authored by Judge Sam D. Johnson, held that "while the provision does not specifically mention the right of a defendant to remove an action from state to federal court, the language of the clause makes clear that the policyholder shall enjoy the right to choose the forum in which any dispute will be heard." *Id.* at 15. The Fifth Circuit elected to follow three district court decisions, rather than the Sixth Circuit precedent on which Nutmeg relied. *Id.*

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## **REASONS FOR GRANTING THE WRIT**

The Fifth Circuit's decision conflicts with a decision of the Sixth Circuit interpreting an almost identical insurance policy provision. This policy provision is a standard form provision in the insurance industry. Its purpose is to permit personal jurisdiction over an insurance company wherever the insured wishes to file suit. Because of the interstate nature of the insurance business, public policy requires an insurance company to defend suits in the state most convenient to the insured. However, public policy also suggests that an insurance company should not be denied the protections of a federal forum whenever diversity of citizenship exists - absent an express waiver of the right of removal.

### **I. THE CONFLICT BETWEEN THE CIRCUITS THREATENS TO EXPAND INTO THE LOWER COURTS**

The Fifth Circuit's decision conflicts with the Sixth Circuit's decision *In re Delta America Re Insurance Co.*, 900 F.2d 890 (6th Cir. 1990). In *Delta America*, the Kentucky insurance commissioner had brought suit in state court against the parent corporation of Delta America, an insolvent insurance company comprised of both Elkhorn Insurance Company and Elkhorn Reinsurance Company, alleging that the parent had mismanaged Delta America. As in the present case, the defendant removed the case to federal court on the basis of diversity of citizenship. The commissioner then moved for remand based on the reinsurance contract, which provided:

It is agreed that in the event of the failure of the reinsurers hereon to pay any amount claimed to be due hereunder, the reinsurers hereon at the request of the Elkhorn will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such courts jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of said court.

*Id.* at 892 (emphasis added).

On the basis of that clause, almost identical to the one at issue here, a federal district court remanded the case to state court. The Sixth Circuit reversed. As part of its holding, the Sixth Circuit stated:

[I]t appears that the primary purpose of the clause is to insure that a reinsurer will submit to the jurisdiction of a court within the United States. Although we have referred to it as a "forum selection clause" the contract itself does not use that language. It would be more appropriate to subscribe it as a "submit to the jurisdiction of a court within the United States" clause. Given that many retrocessionaires are foreign corporations, the concern about *in personam* jurisdiction is logical and understandable. The right of removal, however, in no way interferes with *in personam* jurisdiction . . . .

*Id.* (emphasis added).

While it is true that the Sixth Circuit faced a foreign corporation, the court analyzed the issue as purely a contractual issue and applied basic principles of contract interpretation. *Id.* at 892. Thus, the Sixth Circuit recognized that the clause was relevant only to personal jurisdiction and could not be extended beyond its precise

terms to imply a waiver of the federal statutory right of removal.

By contrast, the Fifth Circuit has expanded this clause to waive the right of removal. Attempting to distinguish the Sixth Circuit's opinion, the Fifth Circuit has said that the policy provision makes no sense if read only to permit *in personam* jurisdiction. *City of Rose City*, 931 F.2d at 15-16. That statement assumes too much; the provision makes perfect sense because it enables a Texas resident to sue a Connecticut insurance company in Texas. The provision does not address the question whether the insurance company waives its right to a federal forum based on diversity of citizenship.

This issue is not new to the federal system. Three district courts have faced the issue and have held the same as the Fifth Circuit. See *Capital Bank & Trust Co. v. Assoc. Int'l Ins. Co.*, 576 F. Supp. 1522, 1524 (M.D. La. 1984); *Perini Corp. v. Orion Ins. Co.*, 331 F. Supp. 453 (E.D. Cal. 1971); *General Phoenix Corp. v. Malyon*, 88 F. Supp. 502 (S.D.N.Y. 1949). But all those lower court decisions predate the Sixth Circuit's decision in 1990. Moreover, they, and the Fifth Circuit, assume that the clause should be implied to preclude removal, requiring the insurer to expressly reserve the right to removal. See *City of Rose City*, 931 F.2d at 15; *Capital Bank & Trust*, 576 F. Supp. at 1525; *Perini Corp.*, 331 F. Supp. at 455. Those cases, and the Fifth Circuit, have it backwards. For reasons of public policy expressed in the next section of this petition, the provision should not be implied to preclude removal unless preclusion is expressly stated. In any event, this Court should now provide a definitive answer to this question.

## II. THE IMPORTANCE OF THIS ISSUE TO BOTH INSUREDS AND INSURERS REQUIRES A DEFINITIVE RESOLUTION

Insurance is an interstate business. Policies are written throughout the nation for insureds who often live far from the state representing the residence of the insurer. No one disputes the soundness of the provision requiring insurers to defend suits in the states selected by their insureds. But this very ability to haul large insurance corporations into the plaintiff's home state implicates the precise policies that convinced Congress to create – and to maintain against recent challenges – diversity jurisdiction in the federal courts. Diversity of citizenship jurisdiction was created to militate against local prejudices. This rationale is particularly important for interstate businesses, which require a stable environment for the resolution of disputes. The availability of a federal forum is critical to ensure uniformity of decision.

The right of removal from state to federal court is a statutory right granted to defendants to protect them from the risk of local prejudices. 28 U.S.C. § 1441(a) (1988). Given the importance of this right, the right of removal can be waived only if the waiver is clear and unequivocal. E.g., *In re Delta Am. Re Ins. Co.*, 900 F.2d at 892. The policy provision in question does not expressly waive the right of removal.

The policy provision in question is a standard form provision found in millions of insurance policies in this nation. There should be a clear answer to the question whether this provision clearly and unequivocally waives the right of removal. Given the split among the federal

courts, this Court is the appropriate forum in which to obtain an answer.

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### CONCLUSION

Nutmeg prays that this Court will grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, that this Court will reverse that court's judgment, and that this Court will award Nutmeg all relief to which it may be entitled.

Respectfully submitted,

FULBRIGHT & JAWORSKI

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Houston, Texas 77010  
(713) 651-5151



App. 1

**CITY OF ROSE CITY, et al.,  
Plaintiffs-Appellants,**

v.

**NUTMEG INSURANCE COMPANY,  
Defendant-Appellee.**

**No. 90-4770**

**Summary Calendar.**

United States Court of Appeals,  
Fifth Circuit.

May 13, 1991.

Appeal from the United States District Court for the  
Eastern District of Texas.

Before JOHNSON, SMITH, and WIENER, Circuit  
Judges.

JOHNSON, Circuit Judge:

Plaintiffs Smith and Smith Materials appeal from the federal district court's refusal to remand this case to the Texas state court where it was filed. For the reasons stated below, this Court will vacate the judgment of the federal district court, and direct the federal district court to remand the case to the Texas state court.

**I. FACTS AND PROCEDURAL HISTORY**

In December 1988 the plaintiffs Curtis Smith and Smith Materials Corp. (collectively, "Smith"), secured a judgment in Texas state court against Rose City in the amount of \$3,500,000. Rose City assigned its rights in various policies of insurance to Smith, including its rights in a general liability policy issued to Rose City by the Nutmeg Insurance Company. Attempting to satisfy its

judgment, Smith brought this action against Nutmeg in Texas state court, seeking to recover under the general liability policy issued to Rose City.<sup>1</sup> Nutmeg removed the case to federal district court. Smith objected to removal, and moved for a remand of the case to the state court. Nutmeg countered with a motion for summary judgment. The federal district court denied Smith's motion to remand, and granted summary judgment in favor of Nutmeg. Smith filed a timely notice of appeal as to both the order refusing to remand the case, and the order granting summary judgment in favor of Nutmeg. In his brief, however, Smith argues only that it was error for the federal district court to refuse to remand this case to the state court.

## II. DISCUSSION

Smith's argument is a straightforward one. Smith contends that the general liability policy issued to Rose City contains an endorsement, entitled "Service of Suit,"

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<sup>1</sup> Smith has previously tried to collect from Nutmeg under another of Rose City's policies of liability insurance, a "claims made public entity" liability policy. Shortly after Smith initially secured its judgment against Rose City, Rose City demanded indemnification from Nutmeg under the claims made public entity liability policy. Nutmeg responded by filing a declaratory judgment action in federal district court, seeking a declaration that the claims made public entity liability policy did not cover the claim made by Smith. Smith counterclaimed. The federal district court determined that Nutmeg was not liable to Smith under the terms of the claims made public entity liability policy, and entered judgment in favor of Nutmeg. This court affirmed. *Nutmeg Ins. Co. v. City of Rose City*, 908 F.2d 969 (5th Cir.1990).

by which Nutmeg agreed to submit to the jurisdiction of the state court. That endorsement provides in part:

[i]n the event of our [Nutmeg's] failure to pay any amount claimed to be due under your [Rose City's] policy, we, at your request agree to submit to the jurisdiction of any Court of Competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

. . . [I]n any suit instituted against us upon this contract, we will abide by the final decision of such Court or any Appellate Court in the event of any appeal.

The question here is whether by this endorsement Nutmeg has waived its right to remove this action from the state court where Smith filed it. Put differently, does this provision give the insured the right to choose the forum in which to try its claims against the insurer?

On its face the endorsement is unambiguous. It plainly requires that the insurer submit to the jurisdiction of any court of the policyholder's choosing. Nutmeg agreed to "submit to the jurisdiction of any court," to "comply with all requirements necessary to give such court jurisdiction," and to "abide by the final decision of such court." Thus, while the provision does not specifically mention the right of a defendant to remove an action from state to federal court, the language of the clause makes clear that the policyholder shall enjoy the right to choose the forum in which any dispute will be heard.

This court has not previously been confronted with the question raised here. Similar disputes, however, have arisen in several district court cases, and those cases have uniformly held that such an endorsement waives the insurer's right to remove an action from state court. In *Capital Bank & Trust Co. v. Assoc. Int'l Ins. Co.*, 576 F. Supp. 1522, 1524 (M.D.La.1984), a federal district court in this circuit held that a substantially identical provision in the policy of insurance at issue in that case precluded the insurer from removing the action from Louisiana state court. The court explained that

[i]f the insurer desired to reserve the right to remove to federal court after the insured chose the state in which he desired to file suit, the insurer could simply have inserted a clause stating "reserving the insurer's right to remove to federal court."

*Id.* at 1525. Invoking the familiar principle that ambiguities in contracts of insurance are to be construed against the drafter of the policy, the court determined that the endorsement precluded the insurer from removing the case. *Id.*

Similar results were reached, on the basis of similar reasoning, in *Perini v. Orion Ins. Co.*, 331 F. Supp. 453 (E.D.Calif.1971), and *General Phoenix Corp. v. Malyon*, 88 F. Supp. 502 (S.D.N.Y.1949). The *Perini* court held that "[u]ntil the clause is changed, . . . the parties are entitled to expect that the clause now means what it has always meant - that 'submission' to a state tribunal precludes removal to a federal court." 331 F. Supp. at 455. Likewise, the *Malyon* court held that the provision in the policy before it "restricts the defendant to the Court in which

suit is first begun against it, be it Federal or State." 88 F. Supp. at 503. In light of these consistent and well reasoned holdings, this court is persuaded that by including the "Service of Suit" endorsement in the general liability policy it issued to Rose City, Nutmeg ceded to Rose City (and therefore its assignees) the right to choose the forum in which any dispute would be heard, and has foregone its right to remove the action. As the court noted in *Capital Bank & Trust*, if Nutmeg had wished to preserve the right to remove any action filed against it in state court, it could easily have said so in the policy.

Nutmeg relies entirely on *In re Delta America Re Ins. Co.*, 900 F.2d 890 (6th Cir.1990). Nutmeg's reliance is misplaced. In *Delta America* the Sixth Circuit held that a clause very similar to the one at issue here – a clause repeatedly referred to as a "forum selection clause" in the *Delta America* opinion – was not in fact a forum selection clause, but was merely a promise to submit to the jurisdiction of some court in the United States. Whatever the merit of the Sixth Circuit's reasoning, it is not applicable here. *Delta America* arose out of an attempt by the liquidator of an insolvent insurance company to sue a number of reinsurance companies; the Sixth Circuit noted that there might be some reinsurance companies which were foreign corporations not otherwise subject to the jurisdiction of any court in the United States, so that it made some sense to hold that the "forum selection clause" was really only a clause by which the reinsurers promised to submit to the jurisdiction of some court in the United States. 900 F.2d at 893.

Here there was no question that Nutmeg would have to submit to the jurisdiction of some court in the United

States. Nutmeg is a Connecticut corporation with its principal place of business in Hartford, Connecticut. Although the question is not before us, so that we do not decide it, it seems quite likely that Nutmeg has minimum contacts with Texas, and probably with other states as well. See *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.95 (1945). It would have made no sense for a policyholder to bargain with Nutmeg for a clause requiring only that Nutmeg would submit to the jurisdiction of some court in the United States. Indeed, it is clear from the language of the clause at issue here that Nutmeg did not promise only to submit to the jurisdiction of "some Court . . . within the United States," but rather promised to submit to the jurisdiction of "any Court . . . within the United States." We are persuaded that this clause gives to the policyholder (or its assignee) the right to select the forum, foreclosing Nutmeg's right to remove this action to federal court.

### III. CONCLUSION

For the reasons stated, the judgment of the federal district court is vacated, and the case is remanded to that court. The federal district court is directed to remand the case to the Texas state court from whence it came.

VACATED AND REMANDED.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
BEAUMONT DIVISION

THE CITY OF ROSE CITY, §  
CURTIS SMITH, AND SMITH §  
MATERIAL CORPORATION OF § C. A. NO.  
BEAUMONT § 1:90 CV 0373  
VS. §  
NUTMEG INSURANCE CO. §

ORDER DENYING MOTION FOR REMAND

CAME ON THIS DAY FOR HEARING the motion of The City of Rose City, Curtis Smith, and Smith Material Corporation of Beaumont for remand, and the Court, having considered the motion, the response of Nutmeg Insurance Company, the argument of counsel and the pleadings in this cause is of the opinion that the motion should be, and hereby is, in all things DENIED.

SIGNED AND ENTERED on this the 12th day of September, 1990.

/s/ Joe J. Fisher  
Honorable Joe J. Fisher  
United States  
District Judge Presiding

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
BEAUMONT DIVISION

THE CITY OF ROSE CITY, §  
CURTIS SMITH, AND SMITH §  
MATERIAL CORPORATION OF § C. A. NO.  
BEAUMONT § 1:90 CV 0373  
VS. §  
NUTMEG INSURANCE CO. §

ORDER GRANTING NUTMEG INSURANCE COMPANY  
SUMMARY JUDGMENT

CAME ON THIS DAY FOR HEARING the motion of defendant Nutmeg Insurance Company for summary judgment, and the Court, having considered the motion, the argument of counsel and the pleadings in this cause, and having taken judicial notice of the pleadings in C.A. No. B-88-1169-CA, is of the opinion that the motion should be, and hereby is, in all things GRANTED.

It is accordingly ORDERED, ADJUDGED and DECREED that plaintiffs The City of Rose City, Curtis Smith and Smith Material Corporation of Beaumont take nothing from defendant Nutmeg Insurance Company by this action, and that defendant recover its costs of court from plaintiffs.

SIGNED AND ENTERED on this the 12th day of September, 1990.

/s/ Joe J. Fisher  
Honorable Joe J. Fisher  
United States  
District Judge Presiding

